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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.;
AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the
Colorado Court of Appeals

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA,

in support of the Petitioners and urging reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The Overwhelmingly Pro-LGBT Economic Environment Makes Respondents' Slippery-Slope Argument Untenable. 2

II. The LGBT Community is Well Funded and Engaged, Wielding Significant Political Power. 7

III. Influential Labor Unions Support LGBT Rights. 13

IV. Cultural Support Is Likely to Enhance LGBT Political Power 14

A. Cultural Icons Sway Public Opinion in Favor of LGBT Rights. 15

B. Various Religious Groups Support LGBT Rights. 16

V. Public Opinion Favors LGBT Rights, And First Amendment Protections. ... 18

VI. Reversing the Colorado Court of Appeals Prevents Discrimination. 20

CONCLUSION **24**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Andersen v. King County, 138 P.3d 963 (Wash. 2006)..... 12

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INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest Christian public policy women's organization in the United States, with half-a-million participants and supporters from all 50 states, including Colorado. Through our grassroots organization, CWA protects and promotes Biblical values and Constitutional principles through prayer, education, and advocacy.

CWA is made up of people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment.

SUMMARY OF THE ARGUMENT

Amicus argues that protecting Petitioners' free speech and free exercise of religion for their artistic expression in this case would not have the detrimental effects alleged by Respondents and assumed by the Colorado Court of Appeals. We document

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[1] All parties have consented to the filing of this Brief. Blanket letters of consent from counsel for Petitioners and counsel for respondent Colorado Civil Rights Commission have been lodged with the Court. Written consent from counsel for the remaining Respondents accompanies the brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and their counsel.

overwhelming evidence that the economic, social, and political power wielded by the lesbian, gay, bi-sexual, transgender community (LGBT) prove the slippery-slope arguments presented are not supported by the evidence.

Upholding Petitioners' First Amendment rights, on the other hand, would guarantee the same type of invidious discrimination the state seeks to prevent is not simply shifted from one group (LGBT individuals) to another (people of faith) in violation of the First Amendment. It would ensure the balance envisioned by the Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), between the right to same-sex marriage and religious freedom, materializes to protect the constitutional rights of all involved.

ARGUMENT

I. The Overwhelmingly Pro-LGBT Economic Environment Makes Respondents' Slippery-Slope Argument Untenable.

Respondents present a picture of the results of protecting Petitioner's free speech and free exercise of religion that is not backed by the evidence. If the Court grants Petitioners' request, "Landlords could refuse to rent to interracial couples," they claim, "employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work, to name just a few examples." Br. in Opp'n at 25. The evidence does not back their conclusion.

It is well established that "[t]he business community ... is one of the most important sources of

interest group activity." Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 Am. Pol. Sci. Rev. 891 (2000). The economic powers that support LGBT rights are the most powerful in the world. Apple, AT&T, Amazon, Facebook, Google, Home Depot, Twitter, Microsoft, and PayPal, just to name a few, have all taken prominent roles, not only in promoting LGBT rights within their organizations, but have used their significant political capital to support LGBT rights in legislatures around the country.[2]

The Human Rights Campaign (HRC) is supported by numerous corporate benefactors: American Airlines, Bank of America, Citibank, Lexus, Diago, Coca Cola, Microsoft, Mitchell Gold & Bob Williams, Morgan Stanley, MetLife, Nationwide Insurance, Prudential, British Petroleum, Caesars Entertainment, Chevron, Harrah's, MGM Resorts International, Nike, Shell, Chase, Cox Enterprises, PWC, Dell, Goldman Sachs, Google, IBM, Macy's, Orbitz, Starbucks, and Tylenol. Human Rights Campaign, *National Corporate Partners*, http://www.hrc.org/the-hrc-story/corporate-partners (click on levels of partnerships). HRC announced this

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[2] See David A. Graham, *The Business Backlash to North Carolina's LGBT Law*, The Atlantic, (March 25, 2016), https://www.theatlantic.com/politics/archive/2016/03/the-backlash-to-north-carolinas-lgbt-non-discrimination-ban/475500/; and *27 Companies That Aren't Afraid to Support The Supreme Court's Gay Marriage Rulings*, Huffington Post, (June 27, 2013), http://www.huffingtonpost.com/2013/06/26/companies-support-gay-marriage_n_3503981.html.

year, "515 employers earned a top rating of 100 percent. This is the largest jump in top rated businesses in a single year in the entire history of the [Corporate Equality Index]." Human Rights Campaign, *Corporate Equality Index*, 4 (2017) https://assets.hrc.org//files/assets/resources/CEI-2017-Final.pdf.

Other homosexual groups also benefit from Corporate America's largess. The Gay, Lesbian, and Straight Education Network (GLSEN) is supported by America's most recognized corporate names.[3] Lambda Legal, "the oldest national organization pursuing high-impact litigation, public education and advocacy on behalf of equality and civil rights for lesbians, gay men, bisexuals, transgender people and people with HIV," boasts donations from the nation's top law firms and corporations.[4]

Funding is not the full extent of support. "There

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[3] In addition to many of those mentioned for the Human Rights Campaign, GLSEN sponsors include Disney/ABC Television, UBS Investment Bank, Johnson & Johnson, Hilton, TimeWarner, Mattel, the NBA, McDonald's, Colgate-Palmolive, WellsFargo, and HBO among others. *See* GLSEN, *Partners*, http://www.glsen.org/support/partners (last accessed Sept. 5, 2017).

[4] Law firms include Baker & McKenzie, Gibson Dunn, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, Mayer Brown, McDermott Will & Emery, O'Melveny & Myers LLP, Perkins Coie LLP, ReedSmith, Sheppard Mullin, Sidley Austin LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Wachtell, Lipton, Rosen & Katz. Lambda Legal, *National Sponsors*, http://www.lambdalegal.org/about-us/sponsors (last accessed Sept. 5, 2017).

are various dimensions to corporate political activity .... [Although] 'corporate PAC donations are important in themselves, [ ] they also should be understood as [just] one quantitative indicator of a range of other corporate political activity.'" Hansen & Mitchell, *supra*, at 891 (citation omitted). Prominent corporations have actively supported nondiscrimination legislation.[5] The President of the Human Rights Campaign has written:

> The nation's largest employers have demonstrated through their actions that LGBTQ people are not just tolerated, but welcomed in their workplaces and communities.

Corporate Equality at 2, *supra*.

This evidence shows the current business landscape strongly favors LGBT protections. Given that environment, it is inconceivable that other businesses would rush to avail themselves of the narrow protections Petitioners are asking for here. We have not seen that happened in the aftermath of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), for example, even though the slippery-slope argument was also presented in that case. The Court noted, "HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures..." *Id* at 2783. But

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[5] *See, e. g.* Equality California, *Sponsors*, http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491 (last accessed July 31, 2014) (bottom of the page lists many major corporations supporting Equality California, including AT&T, Southwest Airlines, and Coca-Cola).

the Court was wise to reject the speculation then, as it should here. The flood never came. A Kaiser Health news report revealed, "only 52 companies or nonprofit organizations have told the government they plan to opt out of Obamacare's requirement to cover birth control because it violates their religious beliefs." *Some Feared Flood of Religious Exemptions From ACA, But Only a Sprinkle Has Materialized*, KHN Morning Briefing, (Oct. 12, 2016), http://khn.org/morning-breakout/some-feared-flood-of-religious-exemptions-from-aca-but-only-a-sprinkle-has-materialized/ (quoting, Jennifer Haberkorn, *Two Years Later, Few Hobby Lobby Copycats Emerge*, POLITICO, (Oct. 11, 2016), http://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627).

This is understandable. The market works against Christian owners seeking to run their businesses according to their deeply held religious beliefs. Their convictions, not economic incentive, motivate them to close on Sundays or pay higher-than-market wages or refuse good business in order to avoid promoting material that violates their religious convictions.

Respondents do not challenge Petitioners' deeply held religious convictions, yet their arguments suggest, without a sliver of evidence, that a desire to harm and discriminate against same-sex couples is the driving force behind their actions. This faulty reasoning undercuts some of our most basic constitutional rights: the right to freedom of speech and the free exercise of religion. The Court should categorically reject it. As the Court has noted, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or

philosophical premises." *Obergefell*, 135 S. Ct. at 2603. Their right to live their lives and conduct their businesses free from government coercion to act contrary to those decent and honorable beliefs should be protected.

II. The LGBT Community is Well Funded and Engaged, Wielding Significant Political Power.

"Few questions are as important to an understanding of American democracy as the relationship between economic power and political influence." Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 Am. Pol. Sci. Rev. 1026 (1977). This is certainly true of the LGBT movement.

In 2007, National Public Radio reported, "[a] new force is emerging in American politics: wealthy, gay political donors who target state level races." Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, (June 26, 2007), http://www.npr.org/templates/story/story.php?storyId=11433268. NPR described an organized effort to finance candidates who support homosexual causes. *Id.*

Similarly, a 2008 *Time Magazine* article discussed a group of homosexual donors known as "the Cabinet." "Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys." John Cloud, *The Gay Mafia That's Redefining Liberal Politics*, Time (Oct. 31, 2008)

http://content.time.com/time/magazine/artcle/0,9171,1855344,00.html (describing the "intriguing development [in the 2008 elections]: anti-gay conservatives had suffered considerably ....").

This year a *Rolling Stone* feature highlighted the gigantic influence of Colorado's own Tim Gill, who has, "methodically, often stealthily, poured $422 million of his fortune into the cause of equal rights for the LGBTQ community—more than any other person in America." Andi Kroll, *Meet the Megadonor Behind the LGBTQ Rights Movement*, ROLLING STONE, (June 23, 2017) http://www.rollingstone.com/politics/features/meet-tim-gill-megadonor-behind-lgbtq-rights-movement-wins-w489213. Gill's well-financed network of LGBT support is staggering:

> Gill's sprawling network of LGBTQ advocacy groups rivals any big-money operation in the country. The Gill Foundation, which he started in 1994, underwrites academic research, polling, litigation, data analytics and field organizing. Gill Action, a political group launched a decade later, has helped elect hundreds of pro-equality lawmakers at the local, state and federal levels. OutGiving, his donor club, coaches the country's richest pro-LGBTQ funders on how best to spend their money. Gill's fingerprints are on nearly every major victory in the march to marriage, from the 2003 *Goodridge v. Dept. of Public Health* case, which made Massachusetts the first state to allow same-sex marriage, to the Supreme Court's *Obergefell v. Hodges* decision two decades later that legalized it in all 50. "Without a doubt," says Mary Bonauto, the

> attorney who argued the Obergefell case, "we would not be where we are without Tim Gill and the Gill Foundation."

Id. This significant pro-LGBT political influence extends even to presidential politics. In the 2012 Presidential campaign, twenty-one prominent homosexual individuals and couples raised at least $7.4 million for President Obama's reelection.[6] In the 2016 race, President Donald J. Trump's candidacy was also aided by significant contributions from the LGBT community. Famously, Silicon Valley homosexual executive Peter Thiel donated $1.25 million.[7] As he campaigned, Trump sought to publicly express his support of the LGBT community, writing on Twitter, "Thank you to the LGBT community! I will fight for you while Hillary brings in more people that will threaten your freedoms and beliefs."[8] Candidate Trump was called, "perhaps the most pro-LGBT presidential nominee in the history of the Republican Party," by the Log Cabin Republicans, the nation's largest Republican organization representing LGBT

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[6] See Melanie Mason, Matea Gold & Joseph Tanfani *Gay Political Donors Move from Margins to Mainstream*, L.A. Times (May 13, 2012), http://artcles.latimes.com/2012/may/13/nation/la-na-gay-donors-20120513.

[7] David Streitfeld, *Peter Thiel to Donate $1.25 Million in Support of Donald Trump*, N.Y. Times (Oct. 15, 2016), https://www.nytimes.com/2016/10/16/technology/peter-thiel-donald-j-trump.html.

[8] Donald J. Trump (@realDonaldTrump), TWITTER (June 14, 2016, 1:31 PM), https://twitter.com/realDonaldTrump/status/742771576039460864.

interests.[9]

Given this reality, Respondents contention that, "If religious motivation exempted businesses from anti-discrimination laws, government would be powerless to protect all Americans from harms of invidious discrimination," Br. in Opp'n at 25, seems to stretch too far. Not only are Petitioners not interested in avoiding their public accommodations responsibilities (noting they do not object to Respondent's sexual orientation but to the celebration of a same-sex wedding), let alone any other area of the law, but the undeniable political force of the LGBT community we have documented renders such contention unsupportable. Colorado, specifically, has moved to include sexual orientation protections in the areas of employment, health care, housing, hate crimes, education, and public accommodations, among others. The granting of Petitioners' request in this case, will not stand the tide of those protections.

It would be hard to characterized the LGBT community as anything but politically successful. While homosexuals are a minority group, their "political voice" greatly outweighs their numbers.[10]

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[9] *Log Cabin Republicans PAC Statement on Presidential Endorsement Decision*, (Oct. 22, 2016), http://www.log-cabin.org/pressrelease/log-cabin-republicans-pac-statement-on-presidential-endorsement-decision/.

[10] In 2013, a National Health Interview Survey estimates that only 1.6% of adults have identified themselves as homosexual. Brian D. Ward, James M. Dahlhamer, Adena M. Galinsky & Sarah S. Joestl, *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, National Health Statistics Reports (July 15, 2014), http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf.

Their unprecedented success has been called, "One of The Most Successful Political Enterprises in History." Walter Hickey, *One of The Most Successful Political Enterprises in History*, Business Insider, (Mar. 29, 2013), http://www.businessinsider.com/gay-rights-marriage-timeline-supreme-court-doma-2013-3. Their ability "to attract the attention of the lawmakers," *City of Cleburne v. Cleburne Living*, 473 U.S. 432, 445 (1985), is beyond dispute. Even if LGBT individuals are underrepresented in decision-making bodies (in that there are fewer open homosexuals in those bodies than there are in the general population), "[s]upport for homosexuals is, of course, not limited to other homosexuals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). They have attracted attention and substantial support for their interests. Author and lawyer Linda Hirshman traced the historic gains in her book, *Victory: The Triumphant Gay Revolution—How a Despised Minority Pushed Back, Beat Death, Found Love, and Changed America for Everyone* (Harper Collins, 2012).

Nearly three decades ago, the Seventh and Ninth Circuits recognized the "growing political power" of homosexuals. *Ben-Shalom* 88 at 466 n.9; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574(9th Cir. 1990) 574. The Ninth Circuit noted that "legislatures have addressed and continue to address the discrimination suffered by homosexuals ... through the passage of anti-discrimination legislation. Thus, homosexuals ... have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation." *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne*, 473 U.S. at 445).

More recently, other courts have understood the same reality. For example, in 2006, Washington's

Supreme Court noted that sexual orientation had been added to Washington's nondiscrimination law and that "several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also provide economic benefit for [same-sex] couples." *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (*en banc*). Additionally, "a number of openly gay candidates were elected to national, state, and local offices in 2004." *Id.* In light of these accomplishments, that court concluded that homosexuals were exercising "increasing political power." *Id.* at 974-75.

In 2007, Maryland's highest court agreed that homosexuals possess significant political power:

> In spite of the unequal treatment suffered ... by [some], we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to "extraordinary protection from the majoritarian political process." To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against [homosexuals] ... based on their sexual orientation has met with growing successes in the legislative and executive branches of government.

Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (citations omitted). Since these decisions, the political power of the LGBT movement has only grown.

Seventy-one percent of homosexuals live in states

with hate crime laws covering sexual orientation.[11] Twenty-two states and the District of Columbia, prohibit employment discrimination based on sexual orientation. Another 11 prohibit discrimination against public employees based on sexual orientation.[12]

Additionally, federal "hate crimes" legislation imposes a minimum sentence on perpetrators of violent crimes "involving actual or perceived ... sexual orientation [or] gender identity." 18 U.S.C. § 249(2). Finally, in 2010, both houses of Congress supported the successful repeal of "Don't Ask, Don't Tell." Stephanie Condon, *Congress Passes "Don't Ask, Don't Tell" Repeal*, CBS News (Dec. 18, 2010) http://www.hrc.org/resources/entry/dont-ask-dont-tell-repeal-act-of-2010.

III. Influential Labor Unions Support LGBT Rights.

Many of the most influential unions actively support LGBT rights, giving them broad reach and support in government and the culture.

The National Education Association (NEA) regularly advocates on behalf of homosexuals, including for same-sex marriage recognition. Nat'l Educ. Ass'n, *Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues*, at 9-10 (2008),

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[11] Movement Advancement Project, *Hate Crime Laws*, http://www.lgbtmap.org/equality-maps/hate_crime_laws (last accessed Sept. 5, 2017).

[12] Human Rights Campaign, *State Maps of Laws & Policies—Employment*, http://www.hrc.org/state-maps/employment (last accessed Sept. 5, 2017).

http://www.nea.org/assets/docs/HE/votingfocus08.pdf. NEA support of homosexual causes influences its 3.2 million members and lends political muscle to Washington.

The American Federation of State, County and Municipal Employees (AFSCME), with 1.6 million members, has resolved to dedicate its resources and time to advancing legislation at both the state and federal level to ensure that same-sex couples receive the same treatment as traditional couples. AFSCME, *Marriage Equality*, Res. 13, 40th Int'l Convention (2012), http://www.afscme.org/members/conventions/resolutions-and-amendments/2012/resolutions/marriage-equality. The Service Employees International Union (SEIU), a 2-million-member labor union, also supports LGBT rights. SEIU, *Our Shared Agenda-Workplace Equality*, http://www.seiu.org/our-shared-agenda-workplace-equality (last accessed, Sep. 4, 2017).

In sum, the LGBT community is allied with some of the most powerful grassroots and lobbying organizations in the country.

IV. Cultural Support Is Likely to Enhance LGBT Political Power.

A. Cultural Icons Sway Public Opinion in Favor of LGBT Rights.

Both news and entertainment media overwhelmingly support LGBT causes. The Gay & Lesbian Alliance Against Defamation (GLAAD) is supported by cultural icons like Oprah, Ellen DeGeneres, Jennifer Aniston, Mary Tyler Moore, Quincy Jones and Russel

Simmons.[13] Other outspoken celebrities supporting LGBT causes include Miley Cyrus, Anne Hathaway, Brad Pitt and Lady Gaga.[14]

GLAAD declares: "Leading the conversation. Shaping the media narrative. Changing the culture. That's GLAAD at work." *About GLAAD*, Gay & Lesbian Alliance Against Defamation ("GLAAD"), http://www.glaad.org/about-glaad-0. And GLAAD touts its "expertise [in] News Media ... Entertainment Media ... Spanish-language and Latino media ... [and] Communications & Digital strategy." *Id.*

Numerous people have speculated that it was no coincidence that the Academy Award-winning film "Milk" was released in the critical week before the November 2008 election, providing invaluable publicity for the homosexual and lesbian community that could not be purchased with campaign funds. *See, e.g.*, John Patterson, *Why Gus van Sant's Milk Is an Important Film*, The Guardian, Dec. 5, 2008, http://www.guardian.co.uk/film/2008/dec/05/john-patterson-milk-gus-van-sant.

And America's news media also renders direct and concrete support for the LGBT community. Two examples follow: First, the 2005 Human Rights Campaign Annual Report stated that its organization

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[13] *GLAAD Celebrity Supporters & Events*, Look to the Stars: The World of Celebrity Giving, https://www.looktothestars.org/charity/glaad (last accessed, Sep. 4, 2017).

[14] Meena Jang, *10 Notable Celebrity LGBT Supporters*, The Hollywood Reporter, http://www.hollywoodreporter.com/lists/celebrities-who-support-lgbt-rights-828708/item/miley-cyrus-10-notable-celebrity-828716 (Oct. 3, 2015).

alone has at least one quote in a newspaper each and every day. Human Rights Campaign, *2005 Annual Report/25 Years of Progress*, http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf (last accessed Sept. 5, 2017). Second, in the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the influential *New York Times*, expressed a "vote No on 8" editorial opinion. Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) ("I looked at the editorial endorsements of the 23 largest newspapers in California by circulation. And of those 23, 21 of the 23 endorsed a No On 8 position. Two of the—the remaining two out of the 23 did not take a position one way or the other .... [N]ational newspapers like the *New York Times* have been important allies of gays and lesbians in the LGBT rights movement.").

B. Various Religious Groups Support LGBT Rights.

Homosexuals are not without support in the religious arena either. A recent compilation of religious groups' official positions regarding same-sex marriage shows great diversity, with many religious organizations officially embracing homosexuality and same-sex partnership. Pew Research Religion & Public Life Project, *Religious Groups' Official Positions on Same-Sex Marriage*, (Dec. 7, 2012), http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/.

For example, many religious organizations supported the "No on 8" campaign in California. Rebecca

Voelkel, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQIA Religious Organizing*, Nat'l Gay & Lesbian Task Force (2009), http://www.thetaskforce.org/static_html/downloads/reports/reports/time_to_build_up_rev.pdf (admitting groundbreaking support for same sex "marriage" by people of faith and identifying plans for outreach). In its November 2008 newsletter, the Unitarian Universalist Association urged congregants to support the campaign. Roger Jones, *Thanks to Friends of Fairness*, The Unigram 4 (Nov. 2008).

When same-sex marriage became legal in Massachusetts, several religious organizations encouraged their clergy to perform such weddings, and some churches chose to do so. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 77-78 (2004).

More recently, the Mormon Church announced its support of legislation to protect homosexuals in housing and employment. Michelle Boorstein & Abby Ohlheiser, *Mormon Church Announces Support for Legal Protections for Gay People*, Wash. Post (Jan. 27, 2015), http://www.washingtonpost.com/news/local/wp/2015/01/27/mormon-church-to-announce-support-for-legal-protections-for-gay-people. And just last month, the nation's largest Presbyterian denomination, the Presbyterian Church (U.S.A.), gave final approval to authorizing same-sex marriages. Laurie Gold Stein, *Largest Presbyterian Denomination Gives Final Approval for Same-Sex Marriage*, N.Y. Times (Mar. 17, 2015), http://www.nytimes.com/2015/03/18/us/presbyterians-give-final-approval-for-same-sex-marriage.html?_r=1. In so doing, it joined the ranks of other

religious bodies that already allow same-sex marriages: the Episcopal Church, the United Church of Christ, the Quakers, the Evangelical Lutheran Church, Reform Judaism, Conservative Judaism, and the Unitarian Universalist Association of Churches. *Id.*

A recent statement in support of the traditional, Biblical view of marriage signed by 150 faith leaders was met with a counter-statement by pro-LGBT faith leaders with double the number of signatures (300). Joshua Gill, *Pro-Gay Church Leaders Condemn Nashville Statement, Say Homosexuality Is 'Fully Blessed by God,'* The Daily Caller, (Aug. 31, 2017) http://dailycaller.com/2017/08/31/pro-gay-church-leaders-condemn-nashville-statement/. And even within organizations that *officially* support only traditional marriage, many individual *members* support same-sex marriage. For example, 52% of Catholics and 34% of Protestants support same-sex "marriage." Pew Research Religion & Public Life Project, *Religion and Attitudes Toward Same-Sex Marriage*, (Feb. 7, 2012), http://www.pewforum.org/2012/02/07/religion-and-attitudes-toward-same-sex-marriage/.

V. Public Opinion Favors LGBT Rights, And First Amendment Protections.

Considering the above, it should be no surprise that public opinion continues to grow in favor of LGBT rights. According to Gallup, in 1996, only 27% of Americans supported same-sex marriage. Today, the number is 64%. Gallup, *Marriage*, http://www.gallup.com/poll/117328/marriage.aspx (last accessed Sept. 4, 2017). In 1977, "only 56 percent of Americans supported gay rights legislation."

> Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1996, 84% of Americans supported gay rights legislation. *Id.* at 55. By 2002, a Gallup poll found that "even though forty-four percent of the people said homosexuality was an unacceptable 'alternative lifestyle,' eighty-six percent thought homosexuals should have 'equal rights in terms of job opportunities.'" *Id. See also, id.* at 150-51 (describing the growing number of Americans who believe that homosexuals should be allowed to adopt).

This change is especially prevalent among the younger generations, where many have grown up knowing homosexuals and seeing them treated with respect. *Id.* at 166; see also, Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, Am. Psychologist, Sept. 2006 at 618 (describing changing attitudes among heterosexuals toward sexual minorities over the last two decades).

Yet, even as the LGBT movement continues to garner support, most Americans want the religious liberties protections guaranteed by the Constitution to be upheld. A June 28, 2017 Rasmussen national survey, in light of the granting of writ in this case, found that 57% believe a baker should be free to refuse to make a wedding cake based on religious beliefs. Only 29% thought the baker should be prosecuted for discrimination. Fourteen percent were undecided.[15]

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[15] Rasmussen Report, *Most Uphold Baker's Right to Refuse Gay Wedding Cake*, (June 28, 2017), http://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_uphold_baker_s_right_to_refuse_gay_

The poll reflects the preoccupation of the nation as it adjusts to the demands of living in a pluralistic society. The Court can help that process by upholding Petitioners' constitutional rights in this case.

VI. Reversing the Colorado Court of Appeals Prevents Discrimination.

Even if Petitioners are granted relief in full before this Court, they are not free to discriminate against individuals because of their sexual orientation. Neither will the state be forcing people of faith to violate their conscience in order to pursue certain creative passions. Reversing the Court of Appeals simply implements the language of this Court in *Obergefell*, when it said:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

Obergefell, 135 S. Ct. at 2625. To permit the state to punish free expression and dismiss sincerely held religious beliefs as animus would in turn promote the

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wedding_cake.

proliferation of discrimination against a new target.

The trend towards the targeting of Christians who hold a traditional view of marriage will increase exponentially. As the Court is aware the cases are numerous and continue to grow.[16] Such blatant, intentional and unconstitutional targeting of people of faith cannot be the answer to the states' efforts to protect discrimination based on sexual orientation. But that is exactly what we are seeing and it is likely to intensify if Respondents arguments were to prevail. "We're going to punish the wicked," said Coloradan pro-LGBT rights megadonor Tim Gill, as he commented on his efforts to expand protections based on sexual orientation. Kroll, *Meet the Megadonor*, *supra*.

Last August, a Catholic farmer in Michigan was barred from selling his product at a local farmers' market because he shared his beliefs on same-sex marriage on a Facebook post. Madeleine Buckley, *A farmer sues after he was ousted from city's farmer's market over his views on same-sex marriage*, THE Washington Post, (June 2, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/02/a-farmer-sues-after-he-was-ousted-from-citys-farmers-market-over-his-views-on-same-sex-marriage/. In Ohio, a pro-LGBT rights group that has been actively supporting Respondents said it could target churches if they refused to allow their property to be used for

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[16] *Elane Photography v. Willock*, 134 S. Ct. 1787 (2014); *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548–49 (Wash. 2017); *In the Matter of: Melissa Elaine Klein, dba Sweetcakes by Melissa*, 34 Boli 102 (OR BOLI 2015), among others.

same-sex weddings. Tyler O'Neil, *Ohio LGBT Group Announces Plans to Target Churches for Homosexual Weddings*, The Aquila Report (Mar. 12, 2017) http://theaquilareport.com/ohio-lgbt-group-announces-plans-target-churches-homosexual-weddings/. As the Court has acknowledged:

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court.

Obergefell, 135 S. Ct. at 2625 (Roberts, C.J. dissenting). And so, we are. The Court should make sure that efforts to protect against discrimination based on sexual orientation do not trample on the rights specifically spelled out in the First Amendment.

The animus against Christians who hold a traditionally Biblical view of marriage continues to grow under the current political and cultural pressures we have discussed. It can be seen in the public comments against Christian business that, like Petitioners, find themselves unfortunately having to defend their beliefs against the cultural trend. A quick glance into the Facebook profiles of such

Christian businesses makes it evident. Here is a sample from two different ones: "Will we RESIST these hypocrital [sic] christo-fascist extremists (who are no better than the taliban). SHUT 'EM DOWN at every turn. WE WILL WIN!!!" Dan Tritto, *Arlene Flowers and Gifts Review*, FACEBOOK, (July 17, 2017), https://www.facebook.com/dan.tritto/activity/1772998602716869; "The owner's [sic] of this shop are bigots! They use religion to hide their hate!" Alfonso Rosales, *Arlene Flowers and Gifts Review*, FACEBOOK, (Feb. 17, 2017), https://www.facebook.com/alfonso.rosales/activity/10105968880387659; "You lost bi***! You now better serve all the a** fu**ers, cu** lickers, cross dressers and sex changes. WELCOME TO THE REAL WORLD!" Jessica Layne, *Arlene Flowers and Gifts Review*, FACEBOOK, (Feb. 16, 2017), https://www.facebook.com/jessicamlayne/activity/1500593689970527; "Cause you hate gays. You are the lowest form of scum ducks on the planet for simply refusing service to a gay couple. F*** you f*** your piece of sh** shop and f*** the vag you crawled out of." Skyler Lee Carpenter, *Arlene Flowers and Gifts Review*, FACEBOOK, (May 13, 2015), https://www.facebook.com/infantrydick/activity/913936381983546; "Take your religion and bible and shove it up your bigoted self-righteous a**." Dan Dellapenta, *Telescope Media Group Review*, FACEBOOK, (Dec. 7, 2016), https://www.facebook.com/dan.dellapenta/activity/1353838254629343; "Boycott these ignorant people, so called Christians that hide behind their religion to discriminate people. I feel sorry for their children." Michelle Watson, *Telescope Media Group Review*, FACEBOOK, (Dec. 7, 2016), https://www.facebook.com/michelle.watson.100/activity/10202913389952616; "This is a hate group. It should be banned by Facebook and consumers." Steve Webb, *Telescope*

Media Group Review, FACEBOOK, (Dec. 8, 2016), https://www.facebook.com/steve.webb.12177/activity/10101946435320450.

That is just a small sample of the animus towards Christian who believe in the traditional view of marriage that has become all too common in this debate. The decision before this Court will undoubtedly have great implications for the future of our constitutional rights and public discourse.

CONCLUSION

For the foregoing reasons, the Court should reject Respondent's argument that, "If religious motivations exempted businesses from anti-discrimination laws, government would be powerless to protect all Americans from the harms of invidious discrimination." Br. in Opp'n at 25. The argument falls under the weight of the evidence presented. Instead, the Court should stand against all forms of discrimination by upholding Petitioners constitutional rights to freedom of speech and the free exercise of religion by reversing the decision on the Colorado Court of Appeals.

Respectfully submitted,
this 7th day of September, 2017,

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